# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

| STATE OF DELAWARE     | ) |                 |
|-----------------------|---|-----------------|
|                       | ) | RK10-09-0070-01 |
| V                     | ) | RK10-09-0071-01 |
|                       | ) |                 |
| NATHANIEL L. JOHNSON, | ) |                 |
| (ID. No. 1008024349)  | ) |                 |
|                       | ) |                 |
| Defendant.            | ) |                 |

Submitted: August 7, 2013 Decided: August 16, 2013

R. David Favata, Esq., Department of Justice, for the State of Delaware.

Nathaniel L. Johnson, Pro se.

Upon Consideration of Defendant's Motion For Postconviction Relief Pursuant to Superior Court Criminal Rule 61 **DENIED** 

YOUNG, Judge

ORDER

State v. Nathaniel L. Johnson

ID. No. 1008024349

August 16, 2013

Upon consideration of the Defendant's Motion For Postconviction Relief, the Commissioner's Report and Recommendation and the record in this case, it appears that:

- 1. The Defendant, Nathaniel L. Johnson ("Johnson"), pled guilty on March 23, 2011 to one count of Burglary in the Second Degree, 11 *Del. C.* § 825 and one count of Strangulation, 11 *Del. C.* § 607. Johnson faced the possibility of life incarceration as a habitual offender had he gone to trial and been found guilty of any one felony and a minimum mandatory sentence of twenty-three years incarceration. In exchange for Johnson's pleas the State entered a *nolle prosequis* on the remaining charges of two counts of Terroristic Threatening, four counts of Endangering the Welfare of a Child, one count of Attempted Burglary in the Second Degree, three counts of Reckless Endangering in the Second Degree, and one count of Criminal Mischief. The State agreed to recommend Johnson receive thirteen years incarceration suspended after serving ten years. The Court agreed to the State's recommendation followed by probation.
- 2. The Defendant did not appeal his conviction or sentence to the Delaware Supreme Court; instead he filed, *pro se*, the pending Motion For Postconviction Relief pursuant to Superior Court Criminal Rule 61. In his motion the defendant raises the following grounds for relief:: 1) Ineffective assistance of Counsel; and 2) Prosecutorial misconduct.
- 3. The Court referred this motion to Superior Court Commissioner Andrea M. Freud pursuant to 10 *Del. C.* §512(b) and Superior Court Criminal Rule 62 for

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proposed findings of facts and conclusions of law.

4. The Commissioner has filed a Report and Recommendation concluding that the Motion For Postconviction Relief should be denied, because it is procedurally barred and meritless.

5. Defendant filed his Appeal from the Commissioners findings and a Motion for Appointment of Counsel on June 27, 2013.

6. The State responded.

**NOW, THEREFORE,** after *de novo* review of the record in this action, and for reasons stated in the Commissioner's Report and Recommendation dated June 14, 2013,

IT IS ORDERED that the Commissioner's Report and Recommendation is adopted by the Court, and the Defendant's Motion for Postconviction Relief is **DENIED.** 

/s/ Robert B. Young

J.

RBY/lmc

oc: Prothonotary

cc: The Honorable Andrea M. Freud

R. David Favata, Esq.

Suzanne MacPherson-Johnson, Esq.

Nathaniel L. Johnson, JTVCC

File

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# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

### IN AND FOR KENT COUNTY

| STATE OF DELAWARE    | ) |                              |
|----------------------|---|------------------------------|
|                      | ) |                              |
| V.                   | ) | RK10-09-0070-01              |
|                      | ) | Burglary 2 <sup>nd</sup> (F) |
| NATHANIEL L. JOHNSON | ) | RK10-09-0071-01              |
|                      | ) | Strangulation (F)            |
| Defendant.           | ) |                              |
| ID. No. 1008024349   | ) |                              |

### COMMISSIONER'S REPORT AND RECOMMENDATION

# **Upon Defendant's Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61**

R. David Favata, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Nathaniel L. Johnson, Pro se.

FREUD, Commissioner June 14, 2013

The defendant, Nathaniel L. Johnson ("Johnson"), pled guilty on March 23, 2011 to one count of Burglary in the Second Degree, 11 *Del. C.* § 825 and one count of Strangulation, 11 *Del. C.* § 607. Johnson was also facing two counts of Terroristic Threatening, four counts of Endangering the Welfare of a Child, one count of

Attempted Burglary in the Second Degree, three counts of Reckless Endangering in the Second Degree and one count of Criminal Mischief. He faced the possibility of life incarceration as a habitual offender had he gone to trial and been found guilty of any one felony and a minimum mandatory sentence of twenty-three years incarceration. In exchange for Johnson's pleas the State entered *nolle prosequis* on the remaining charges and agreed to recommend Johnson receive thirteen years incarceration suspended after serving ten years. The Court agreed with the plea agreement and sentenced Johnson to a total of thirteen years incarceration suspended after ten years followed by probation.

The charges stemmed from Johnson breaking in to the residence of his exgirlfriend and strangling her from behind and later making a second attempt to break into the residence by throwing a rock through the window and threatening to kill her. Johnson fled when the victim called 911. Her children were present during the crimes.

### **JOHNSON'S CONTENTIONS**

In his motion, Johnson raises the following grounds for relief:

Ground One: Ineffective Assistance of Counsel.

See Memorandum of Law in support of Motion. [Defendant sets out five "grounds" in his memo of law for ineffective assistance of counsel.

- I. Defendant's counsel rendered ineffective assistance of counsel when she failed to adequately cross-examine the arresting officer at the alleged crime scene at the preliminary hearing.
- II. Defendant's counsel rendered ineffective assistance of counsel when counsel's representation fell below an objective

standard of reasonableness when Defendant's request for counsel to file a motion of dismissal, a motion for a suppression hearing, and a motion for dismissal of counsel was not done.

- III. Defendant's counsel rendered ineffective assistance of counsel when his counsel was being forceful of him to take a plea, after Defendant stated he was innocent, in a duress and coerce manner due to the Defendant's lack of knowledge for any and all litigating factors.
- IV. Defendant's counsel rendered ineffective assistance of counsel when counsel ignoring Defendant's chosen objective, the right to a trial by a jury of his peers but instead badgered the Defendant with 6 or more pleas.
- V. Defendant's counsel rendered ineffective assistance of counsel when his counsel's lack of all preparations and communication in the pre-trial stages of his case knowing that there was no physical evidence against him.]

Ground Two: Prosecutorial Misconduct.

See Memorandum of Law in support of Motion.

[VI. Prosecutor committed misconduct when the Prosecutor had threatened him with natural life in prison to proceed with trial, knowing there wasn't any physical evidence against Defendant.]

### **DISCUSSION**

Under Delaware law, this Court must first determine whether Johnson has met the procedural requirements of Superior Court Criminal Rule 61(I) before it may consider the merits of his postconviction relief claim.<sup>1</sup> This is Johnson's first motion for postconviction relief, and it was filed within one year of his conviction becoming final. Therefore, the requirements of Rule 61(i)(1) - requiring filing within one year and (2) - requiring that all grounds for relief be presented in initial Rule 61 motion, are met. Johnson's claims were not raised at the plea, sentencing, or on direct appeal. Therefore, they are barred by Rule 61(i)(3), absent a demonstration of cause for the default and prejudice. To some extent each of Johnson's claims are based on ineffective assistance of counsel; therefore, he has alleged cause for his failure to have raised them earlier.

At this point, Rule 61(i)(3) does not bar relief as to Johnson's claims of ineffective assistance of counsel, provided he demonstrates that his counsel was ineffective and that he was prejudiced by counsel's actions. To prevail on his claim of ineffective assistance of counsel, Johnson must meet the two prong test of *Strickland v. Washington*.<sup>2</sup> In the context of a guilty plea challenge, *Strickland* requires a defendant show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's actions were prejudicial to him in that there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial and that the result of a trial would have been his acquittal.<sup>3</sup> The failure to establish that a defendant would not have pled guilty and would have proceeded to trial is sufficient cause for denial of

<sup>&</sup>lt;sup>1</sup> Bailey v. State, 588 A.2d 1121, 1127 (Del. 1991).

<sup>&</sup>lt;sup>2</sup> 466 U.S. 668 (1984).

<sup>&</sup>lt;sup>3</sup> *Id*. At 687,

relief.<sup>4</sup> In addition, Delaware courts have consistently held that in setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.<sup>5</sup> When examining the representation of counsel pursuant to the first prong of the Strickland test, there is a strong presumption that counsel's conduct was professionally reasonable.<sup>6</sup> This standard is highly demanding.<sup>7</sup> *Strickland* mandates that, when viewing counsel's representation, this Court must endeavor to "eliminate the distorting effects of hindsight."<sup>8</sup>

Following a complete review of the record in this matter, it is abundantly clear that Johnson has failed to allege any facts sufficient to substantiate his claim that his attorney was ineffective. I find counsel's affidavit, in conjunction with the record, more credible than Johnson's vague and entirely unsubstantiated contention that his counsel's representation was ineffective. Johnson's counsel clearly and unequivocally denies the allegations.

As noted by counsel, due to his criminal background, Johnson was facing life in prison had he been convicted, and the sentence and plea were reasonable under all

<sup>&</sup>lt;sup>4</sup> *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997)(citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988))(citations omitted).

<sup>&</sup>lt;sup>5</sup> See e.g., Outten v. State, 720 A.2d 547, 557 (Del. 1998) (citing Boughner v. State, 1995 WL 466465 at \*1 (Del. Aug. 2, 1995)).

<sup>&</sup>lt;sup>6</sup> Albury, 551 A.2d at 59 (citing Strickland, 466 U.S. at 689).

<sup>&</sup>lt;sup>7</sup> Flamer v. State, 585 A.2d 736, 754 (Del. 1990)(quoting Kimmelman v. Morrison, 477 U.S. 365, 383 (1986)).

<sup>&</sup>lt;sup>8</sup> *Strickland*, 466 U.S. at 689.

the circumstances. Prior to the entry of the plea, Johnson and his attorney discussed the case. The State had strong evidence against Johnson. The plea bargain was clearly advantageous to Johnson. Counsel's representation was certainly well within the range required by Strickland. Additionally, when Johnson entered his guilty plea, he stated he was satisfied with defense counsel's performance. He is bound by his statement unless he presents clear and convincing evidence to the contrary. Consequently, Johnson has failed to establish that his counsel's representation was ineffective under the Strickland test.

Even assuming, arguendo, that counsel's representation of Johnson was somehow deficient, Johnson must satisfy the second prong of the Strickland test, prejudice. In setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk dismissal.<sup>10</sup> In an attempt to show prejudice, Johnson simply asserts that his counsel was ineffective. His statements are insufficient to establish prejudice, especially given the facts of these cases, the video tape and his confession.

To the extent that Johnson alleges his plea was involuntary, the record clearly contradicts such an allegation. When addressing the question of whether a plea was constitutionally knowing and voluntary, the Court looks to the plea colloquy to

<sup>&</sup>lt;sup>9</sup> Mapp v. State, 1994 WL 91264, at \*2 (Del. Mar. 17, 1995) (citing Sullivan v. State, 636 A.2d 931, 937-938 (Del. 1994)).

<sup>&</sup>lt;sup>10</sup> Larson v. State, 1995 WL 389718, at \*2 (Del. June 23, 1995)(citing Younger v. State, 580 A.2d 552, 556 (Del. 1990)).

determine if the waiver of constitutional rights was knowing and voluntary. <sup>11</sup> At the guilty-plea hearing, the Court asked Johnson whether he understood the nature of the charges, the consequences of his pleading guilty, and whether he was voluntarily pleading guilty. The Court asked Johnson if he understood he would waive his constitutional rights if he pled guilty; if he understood each of the constitutional rights listed on the Truth-in-Sentencing Guilty Plea Form ("Guilty Plea Form"); and whether he gave truthful answers to all the questions on the form. The Court asked Johnson if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Johnson if he was giving the plea of his own free will because he was in fact guilty. The Court also asked Johnson if he was satisfied with his counsel's representation. Finally, the Court asked Johnson if he was in fact guilty of the charges. Johnson answered each of these questions affirmatively. <sup>12</sup> I find counsel's representations far more credible than Johnson's self-serving, vague allegations.

Furthermore, prior to entering his guilty plea, Johnson signed a Guilty Plea Form and Plea Agreement in his own handwriting. Johnson's signatures on the forms indicate that he understood the constitutional rights he was relinquishing by pleading guilty and that he freely and voluntarily decided to plead guilty to the charges listed

<sup>&</sup>lt;sup>11</sup> Godinez v. Moran, 509 U.S. 389, 400 (1993).

Sentencing at pp. 4-11. It should be noted that during the plea colloquy Johnson at one point stated he "didn't do it, though." At which point the Court stated they would proceed to pick a jury. Trial counsel requested a recess to speak with Johnson which was granted. Following the recess Johnson indicated that he did wish to plead guilty and the colloquy proceeded. See Tr. at pp. 6-7.

in the Plea Agreement. Johnson is bound by the statements he made on the signed Guilty Plea Form, unless he proves otherwise by clear and convincing evidence.<sup>13</sup> I confidently find that Johnson entered his guilty plea knowingly and voluntarily and that Johnson's grounds for relief are completely meritless.

## **CONCLUSION**

I find that Johnson's counsel represented him in a competent and effective manner and that Johnson has failed to demonstrate any prejudice stemming from the representation. I also find that Johnson's guilty plea was entered knowingly and voluntarily. Consequently, I recommend that the Court deny Johnson's motion for postconviction relief as procedurally barred and totally meritless.

## /s/ Andrea Mayhee Freud Commissioner

AMF/dsc

oc: Prothonotary

cc: Hon. Robert B. Young R. David Favata, Esq.

Suzanne MacPherson-Johnson, Esq.

Nathaniel L. Johnson, VCC

File

<sup>&</sup>lt;sup>13</sup> *Sommerville*, 703 A.2d at 632.